

In the United States Court of Appeals  
for the Ninth Circuit

---

S. B. TRESSLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX  
COURT OF THE UNITED STATES

---

BRIEF FOR THE RESPONDENT

---

H. BRIAN HOLLAND,  
*Assistant Attorney General.*

ELLIS N. SLACK,  
A. F. PRESCOTT,  
GEORGE F. LYNCH,  
*Special Assistants to the  
Attorney General.*

---

---

FILED

SEP 3 1954

PAUL P. O'BRIEN  
CLERK



# INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Questions presented .....	2
Statutes and Regulations involved .....	2
Statement .....	3
Summary of argument .....	7
 Argument:	
I. The Tax Court did not err in holding that sums paid to discharge legal obligations imposed on taxpayer were taxable income to taxpayer.....	8
II. The Tax Court did not err in disallowing as deductions legal expenses incurred in contesting a wife's suit for support .....	13
III. The Tax Court did not err in failing to allow the increased depreciation claimed .....	15
Conclusion .....	16
Appendix .....	17

## CITATIONS

### Cases:

<i>Brightbill v. Commissioner</i> , decided February 4, 1949, affirmed <i>per curiam</i> , 178 F. 2d 404.....	12
<i>Brown v. Commissioner</i> , 7 T. C. 715.....	12
<i>Coaster Amusement Co. v. Commissioner</i> , decided July 8, 1943.....	13
<i>Commissioner v. Smith</i> , 324 U.S. 177, rehearing denied, 324 U.S. 695 .....	13
<i>Daine v. Commissioner</i> , 168 F. 2d 449.....	11, 12
<i>Deputy v. duPont</i> , 308 U.S. 488.....	16
<i>Donnelly v. Commissioner</i> , 16 T.C. 1196.....	15
<i>Douglas v. Willcuts</i> , 296 U.S. 1.....	13
<i>Fields v. Commissioner</i> , 14 T.C. 1202, affirmed on other grounds, 189 F. 2d 950.....	12
<i>Fox v. Commissioner</i> , 14 T.C. 1131.....	12
<i>Helvering v. Horst</i> , 311 U.S. 112.....	13
<i>Howard v. Commissioner</i> , 202 F. 2d 28, affirming 16 T.C. 157..	10, 14
<i>Interstate Transit Lines v. Commissioner</i> , 319 U.S. 590.....	16
<i>Jergens v. Commissioner</i> , 17 T.C. 806.....	15
<i>Kalchthaler v. Commissioner</i> , 7 T.C. 625.....	12
<i>McKinney v. Commissioner</i> , 16 T.C. 916.....	12
<i>Old Colony Tr. Co. v. Commissioner</i> , 279 U.S. 716 .....	13
<i>Terrell v. Commissioner</i> , 179 F. 2d 838.....	11
<i>Tressler v. Tressler</i> , 157 Fla. 881, certiorari denied, 329 U.S. 796, rehearing denied, 329 U.S. 834.....	9
<i>United States v. Boston &amp; M. R. Co.</i> , 279 U.S. 732 .....	13
<i>Wick v. Commissioner</i> , 7 T.C. 723, affirmed, 161 F. 2d 732.....	12

## Statutes:

## Internal Revenue Code:

	Page
Sec. 22 (26 U.S.C. 1952 ed., Sec. 22) .....	17
Sec. 23 (26 U.S.C. 1952 ed., Sec. 23) .....	18
Sec. 171 (26 U.S.C. 1952 ed., Sec. 171) .....	19

## Miscellaneous:

Treasury Regulations 111, Sec. 29.22(k)-1 .....	20
---	----

**In the United States Court of Appeals  
for the Ninth Circuit**

---

No. 14205

S. B. TRESSLER, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX  
COURT OF THE UNITED STATES*

---

**BRIEF FOR THE RESPONDENT**

---

**OPINION BELOW**

The memorandum findings of fact and opinion of the Tax Court (R. 1-15) are not officially reported.

**JURISDICTION**

The petitions for review (R. 56-59, 61-64) involve deficiencies in individual income taxes for the years 1946 and 1947 in the respective amounts of \$1,616.80 and \$2,049.68.

A notice of deficiency was mailed to taxpayer on March 14, 1950, with respect to the year 1946. On June 12, 1950, taxpayer filed with the Tax Court a petition for redetermination under the provisions of Section 272 of the Internal Revenue Code.

The notice of deficiency for 1947 was dated March 14, 1951. (R. 2.) On June 11, 1951, taxpayer filed a petition for redetermination with the Tax Court under the provisions of Section 272 of the Internal Revenue Code.

The decisions of the Tax Court were entered on September 17, 1953. (R. 16, 17.) The cases are brought to this Court by petitions for review filed on December 17, 1953. (R. 59, 64.) Jurisdiction is conferred on this Court by Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

#### QUESTIONS PRESENTED

1. Whether the Tax Court erred in holding that the payment to taxpayer's wife by a receiver, pursuant to court order, of temporary support, attorneys' fees and court costs from funds in the hands of the receiver which belonged to taxpayer, constituted income taxable to taxpayer.

2. Whether the Tax Court erred in holding that legal expenses incurred by taxpayer in contesting his wife's suit for temporary alimony were not deductible as non-business expenses under Section 23(a)(2) of the Internal Revenue Code.

3. Whether the Tax Court erred in refusing to allow a claim for increased depreciation on rental properties under Section 23(1) where the taxpayer failed to prove his right thereto.

#### STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*.

## STATEMENT

The findings of the Tax Court may be stated as follows:

Taxpayer is an individual residing in Reno, Nevada. He filed his federal income tax returns for 1946 and 1947 on the cash basis. (R. 2.)

During the early months of 1945, while married to and living with Ada Zoeller Tressler, taxpayer purchased the Maxwell Court Apartments and the Tarpon River Apartments in Broward County, Florida, in the name of Kenneth Tressler, his son by a former marriage. Title to other properties purchased was taken in the name of Ada Tressler and taxpayer jointly. The taxpayer also owned additional property, and a receivership hereinafter mentioned did not include all his property. (R. 2-3.)

Shortly after purchase of this property Ada Tressler filed suit for support "unconnected with a divorce" in the Florida courts. In that suit she asked for a decree adjudging that the properties purchased in the name of Kenneth were held in trust for the taxpayer and requesting that a receiver be appointed to take charge of those properties, collect the rents and pay the proceeds into court to insure the payment of any sums that might be adjudged due and payable to Ada by the taxpayer. (R. 3-4.)

On March 13, 1945, the Florida court entered an order appointing a receiver for the two apartment properties, restraining Kenneth and the taxpayer from transferring those properties, and directing the receiver to collect the rents, pay expenses of operation, and deposit the balance of the receipts in a bank subject to further court order. (R. 4.)

On June 28, 1945, an order was entered making an allowance of \$300 per month, retroactive to March 3, 1945, for temporary alimony and support of Ada and \$2,000 temporary attorney fees, and court costs of \$334.86.

On July 17, 1945, taxpayer was granted a Nevada divorce from Ada in an action begun by him May 7, 1945. This action was uncontested by Ada, and no provision for alimony was made in the decree. (R. 4.)

In October 1945, Kenneth sought to file a further answer in the Florida proceedings in an effort to regain possession of the apartment properties and to plead therein the Nevada divorce decree, but was denied the right to file the answer. By order dated January 7, 1946, the Florida court decreed that the apartment properties purchased by the taxpayer in the name of Kenneth were properties of the taxpayer and held in trust for him by Kenneth. Later in January the court ordered the receiver to pay the sum of \$5,334.86. This amount was made up of three items: (1) \$3,000 for accrued support of Ada from March 3, 1945, to January 3, 1946; (2) \$2,000 temporary attorney fees; and (3) \$334.86 costs. (R. 4-5.)

An appeal from those orders was denied by the Florida Supreme Court and Kenneth took the matter to the United States Supreme Court. While that proceeding was pending, the taxpayer himself began an action in a United States District Court in Florida against Ada, the receiver, and others, seeking recovery of his apartment properties held in receivership. A motion to dismiss was granted and an appeal was taken. While this appeal was pending and after the United States Supreme Court had denied certiorari in Kenneth's case



the parties entered into a settlement agreement under which Ada acquired the Tarpon River Apartments and other properties and taxpayer retained the Maxwell Court Apartments. In accordance with the settlement agreement all the litigation above described was terminated and a decree was entered by the Florida court to the effect that the various court orders be marked satisfied and the properties be released from the receivership.<sup>1</sup> (R. 5.)

On August 31, 1947, the taxpayer sold the Maxwell Court Apartments for \$59,000. (R. 5.)

In connection with the litigation in the Florida and the United States courts, the taxpayer bore the expense of the legal representation for Kenneth and himself.

<sup>1</sup> A summary of the income and disposition of the rents collected, expenses paid, and disposition of the remaining funds by years by the receiver is shown in the following schedule (R. 6):

	1945	1946	1947	Total
Rents collected . . . . .	\$7,393.50	\$11,092.95	\$2,410.00	\$20,896.45
Expenses paid . . . . .	2,992.91	3,199.48	2,269.50	8,461.89
Income after main- tenance expenses . . .	\$4,400.59	\$7,893.47	\$140.50	\$12,434.56
Other payments by re- ceiver: Ada Tressler Davis & Lockhart, Attorney for Ada Tressler . . . . .		\$3,000.00	\$984.69	\$3,984.69
R u t h Westerberg, Receiver . . . . .		2,000.00	2,862.55*	5,197.41
Hugh Lester, Attorney for Receiver . . . . .			1,559.46	1,559.46
Court Costs . . . . .		334.86	193.00	1,500.00
Total other payments by receiver . . . . .		\$5,334.86	\$7,099.70	\$12,434.56
Amount retained by receiver . . . . .	\$4,400.59	\$2,558.61		

\* This amount according to the court's order was for expenses and attorney fees "for services rendered to the Receiver, in all Federal Courts."

For the year 1946 he claimed on his return a deduction of \$1,425 for legal expenses and attorneys fees; by amended pleadings he claimed \$5,500. For 1947 he claimed a deduction of \$5,035 for such expenses; by amended pleadings he claimed \$6,535. (R. 6.)

The Commissioner determined a deficiency of \$701.07 for 1946 based on disallowance of claimed legal expenses of \$1,425 and depreciation of \$1,931.25. By amended answer the Commissioner increased the deficiency for 1946 to \$2,239.64 based on his contention that the taxpayer realized additional income by reason of the payment of \$5,334.86 made by the receiver to Ada under the January 17, 1946, order of the Florida court for support, attorney fees, and court costs. (R. 6-7.)

The Commissioner determined a deficiency of \$936.29 for 1947 as a result of the disallowance of the claimed deduction of \$5,035 for attorney fees and an error of \$1,000 (admitted by the taxpayer) in computing net income. By amended answer this deficiency was increased to \$3,967.15 partly based on the contention that the taxpayer realized additional income by reason of payments amounting to \$7,099.70 made by the receiver under final decree of the Florida court dated July 16, 1947. The increase also was occasioned by disallowance of \$2,517.50 legal expenses which were added by the Commissioner to the cost of the Maxwell Court Apartments in computing the capital gain arising from the sale thereof. Another portion of the increase resulted from increasing the capital gain by off-setting depreciation for 1946 on the apartments in the sum of \$1,246. (R. 7.)

The Tax Court sustained the Commissioner in his actions with respect to both tax years, except that for

the year 1947 it held that an item of \$2,862.55 and one of \$1,500 paid to attorneys (R. 6) represented receivership expenses and did not, as the Commissioner had asserted (R. 7) constitute additional income to taxpayer. Decisions were entered (R. 16-17) in accordance with a computation made under Rule 50 of the Tax Court's rules (R. 34-38).

#### SUMMARY OF ARGUMENT

The payments made by a receiver, pursuant to a Florida court order, to taxpayer's wife for "temporary alimony and support", attorneys fee and court costs, from funds in the hands of the receiver belonging to taxpayer constituted taxable income to him. The fact that taxpayer did not have custody or control of the funds is immaterial for by the application thereof in satisfaction of legal obligations imposed upon him he received the benefit of such funds and was properly taxable thereon.

In so holding, the Tax Court gave full faith and credit to both the Florida decree ordering the payments and a prior Nevada divorce decree obtained by taxpayer. However, since the Florida court had rejected all efforts to inject the Nevada decree into the Florida proceedings, the payments obviously were not made under the Nevada divorce decree and hence could not be considered taxable income to the wife under the provisions of Code Section 22(k), as taxpayer argued.

Similarly, since the payments were not made pursuant to any "decree" of separation by the Florida court they were not taxable to the wife under Section 22(k).

Taxpayer's further contention that the Tax Court erred in denying him the right to deduct the legal expenses incurred "in trying to recover possession of his

income producing properties" is equally without merit. The Tax Court found that the expenses were not incurred for the purpose declared by taxpayer, but rather were incurred primarily to defeat his wife's suit for support. This Court has held under similar circumstances that expenses so incurred were not deductible as non-business expenses. Furthermore, as to the portion of those expenses paid on behalf of his son Kenneth, taxpayer was a volunteer and could not claim a deduction therefor under any provision of the Code.

Finally, taxpayer's claim that the Tax Court erred in refusing to allow him the full depreciation claimed on the properties involved is without merit for he failed to sustain the burden of proof with respect thereto.

#### ARGUMENT

### I

#### **The Tax Court Did Not Err in Holding That Sums Paid to Discharge Legal Obligations Imposed on Taxpayer Were Taxable Income to Taxpayer**

Taxpayer, having first asserted as error (Br. 7, 8-9) that the Tax Court failed to accord full faith and credit to the Nevada divorce decree obtained by him under date of July 17, 1945, argues (Br. 10-11) that the payments thereafter ordered to be made to his wife by the Florida court as "temporary alimony," as well as court costs and attorneys' fees, were taxable as income to his "former" wife under Sections 22(k), 23(u), and 171 of the Internal Revenue Code (Appendix, *infra*).

The question before the Tax Court, however, was not the full faith and credit of the Nevada decree, but rather the tax treatment to be accorded the sum of

\$5,334.86 (consisting of \$3,000 accrued support for his wife from March 3, 1945, to January 3, 1946; \$2,000 temporary attorneys' fees; and \$334.86 court costs) for the year 1946 and the sum of \$7,099.70 (including \$984.69 support money and \$193 court costs) for the year 1947 (R. 1-2) as between taxpayer and his wife.

In resolving that question insofar as it related to the support payments, attorneys' fees, and court costs, the Tax Court found (R. 8) that those items represented obligations imposed on taxpayer by the Florida court; that they were satisfied by the application of funds derived from rentals from properties found by the Florida court to belong to taxpayer; that they were personal obligations of the taxpayer unconnected with the operation of those properties in the hands of the court appointed receiver; that taxpayer reported his income on a cash basis and consequently was properly taxable in 1946 and 1947 when he received the benefit of those funds through the discharge of his obligations to his wife under the Florida court order.

It was not incumbent upon the Tax Court to resolve the validity of the Florida court's right to order the payments in question, as taxpayer contends. (Br. 8-9.) That was a matter for determination by the Florida courts, and upon appeal to the Supreme Court of Florida, the action of the lower court was affirmed without opinion. *Tressler v. Tressler*, 157 Fla. 881, 27 S. 2d 341, certiorari denied, 329 U. S. 796, rehearing denied, 329 U. S. 834. The Tax Court was obligated to recognize the validity of that decision just as it was bound to recognize the Nevada divorce decree, and, in fact, by doing so it resolved the tax liability complained of. This is best explained, as it was by the Tax Court (R.

10-11), by considering taxpayer's argument that the temporary alimony payments constituted income to his former wife under Section 22(k) and correspondingly were deductible by him under Section 23(u).<sup>2</sup>

As appears from the unquestioned findings of the Tax Court and as the Tax Court pointed out, the payments were made solely in connection with litigation instituted by the wife in a Florida court and had no relation to the Nevada divorce which made no provision for alimony or support. The suit was entitled a "Bill for Alimony Unconnected with Divorce" and prayed for "temporary and permanent support and alimony unconnected with a divorce together with suit money and a reasonable amount with which to compensate her attorneys." (R. 3, 4, 11.) In granting the relief sought, the Florida court denominated the payments ordered as "temporary alimony and support". (R. 10, 32; Br. 26.) Furthermore, as also noted by the Tax Court (R. 10-11), the record does not disclose that any "decree \* \* \* of separate maintenance" such as required by Section 22(k) was entered in the Florida litigation.

Although taxpayer's son Kenneth, one of the named defendants in the wife's suit, had sought to plead the Nevada divorce decree therein in connection with his effort to regain possession of the apartment properties which the Florida court had placed in the hands of a receiver pending determination of the ownership thereof, he was denied the right to do so. (R. 4.)<sup>3</sup> As

---

<sup>2</sup> Whether taxpayer is claiming that the court awarded attorneys' fees and court costs are also deductible under Section 23(u) is not clear. However, such expenses are clearly personal and not deductible under any provision of the Internal Revenue Code. See *Howard v. Commissioner*, 202 F. 2d 28 (C. A. 9th).

<sup>3</sup> The reason for the denial does not appear from the record herein.

the Tax Court observed (R. 11), the Florida courts resisted all taxpayers's efforts to inject the Nevada divorce decree into the Florida proceedings.<sup>4</sup>

In determining whether the payments are taxable to the wife under Section 22(k) it is required that the wife be "divorced or legally separated" from her husband "under a decree of divorce or of separate maintenance"; that the payments be "received subsequent to such decree"; and that they discharge a legal obligation which because of the marital relationship is imposed upon or incurred by the husband "under such decree or under a written instrument to such divorce or separation."

Under the circumstances described above it is clear that inasmuch as the Nevada decree was not before the Florida court, the payments in question had no connection whatsoever with the Nevada divorce, but rather were made in total disregard of that decree. Consequently the payments are not taxable to the wife nor deductible by the husband under the provisions of Sections 22(k) and 23(u) as far as the Nevada decree is concerned.

With respect to the decision of the Florida court, it is clear that a voluntary separation is insufficient to satisfy the statutory requirements of Section 22(k); there must be a *decree* of separate maintenance. *Terrell v. Commissioner*, 179 F. 2d 838 (C. A. 7th); *Daine*

---

<sup>4</sup> The action of the Florida court decreeing that the apartment properties purchased by taxpayer in the name of Kenneth were properties of the taxpayer and held in trust for him by Kenneth and ordering the receiver to pay the sum of \$5,334.86 to taxpayer's wife, was affirmed by the Florida Supreme Court without opinion, 157 Fla. 881, 27 S. 2d 341, certiorari denied, 329 U. S. 796, rehearing denied, 329 U. S. 834. Those decrees, constituting parts of Exhibit E, are printed in Appendix C at pages 24-35 of taxpayer's brief.

v. *Commissioner*, 168 F. 2d 449 (C. A. 2d); *Brown v. Commissioner*, 7 T. C. 715; *Kalchthaler v. Commissioner*, 7 T. C. 625; *Wick v. Commissioner*, 7 T. C. 723, affirmed *per curiam*, 161 F. 2d 732 (C. A. 3d); *Brightbill v. Commissioner*, decided February 4, 1949 (1949 P-H T. C. Memorandum Decisions, par. 49,021), affirmed *per curiam*, 178 F. 2d 404 (C. A. 3d); *Fields v. Commissioner*, 14 T. C. 1202, affirmed on other grounds, 189 F. 2d 950 (C. A. 2d); *Fox v. Commissioner*, 14 T. C. 1131; *McKinney v. Commissioner*, 16 T. C. 916.

In the absence of any such decree of separate maintenance, the Tax Court correctly held that the payments should receive the same treatment as payments of alimony *pendente lite* or payments made between the entry of an interlocutory decree and the time the decree became final. Such payments, however, are not taxable to the wife under Section 22(k) nor deductible by the husband under Section 23(u) of the Code. *McKinney v. Commissioner*, *supra*; *Fields v. Commissioner*, *supra*; *Fox v. Commissioner*, *supra*.

Since, as pointed out above, there was no evidence before the Florida court that taxpayer herein was divorced from his wife, and since the Tax Court found (R. 11) that no decree of separate maintenance was entered in the Florida litigation, it follows that there is no basis for taxpayer's contention (Br. 10-11) that the payments in question are income to his wife under Code Section 171.

The fact that the taxpayer did not actually receive any of the revenue collected by the receiver from the operation of the apartment properties and paid to his wife pursuant to the orders of the Florida court, does not relieve him from liability for tax thereon as he



contends. (Br. 6.) Taxpayer reported his income on the cash receipts and disbursements basis and is, therefore, taxable on income when credited to him. The discharge of taxpayer's indebtedness in 1946 and 1947 by the payment of temporary alimony and support, attorneys' fees, and court costs constitutes a receipt by taxpayer of the sums so paid. See *Douglas v. Willcuts*, 296 U. S. 1; *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716; *United States v. Boston & M. R. Co.*, 279 U. S. 732; *Helvering v. Horst*, 311 U. S. 112; *Commissioner v. Smith*, 324 U. S. 177, rehearing denied, 324 U.S. 695; and *Coaster Amusement Co. v. Commissioner*, decide July 8, 1943 (1943 P-H T.C. Memorandum Decisions, par. 43,333).

## II

### **The Tax Court Did Not Err in Disallowing as Deductions Legal Expenses Incurred in Contesting a Wife's Suit for Support**

Taxpayer also claims error on the part of the Tax Court (Br. 12) in denying him the right to deduct "legal expenses expended in trying to recover possession of his income producing properties". The right to the deduction is apparently claimed under Section 23(a)(2) of the Code (Appendix, *infra*),<sup>5</sup> which allows deductions for nonbusiness, ordinary, and necessary expenses paid or incurred "for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

The relevant facts, as found by the Tax Court, show

---

<sup>5</sup> In its opinion, the Tax Court pointed out (R. 11) that taxpayer had not cited any sections of the Code in support of his claim, but that whether he relied on Section 23(a)(1)(A) or (a)(2) he was not entitled to the relief sought.

that title to the properties was originally taken in the name of taxpayer's son, Kenneth; that in connection with her suit for support, taxpayer's wife sought a decree adjudging that those properties were held in trust for taxpayer, and that a receiver be appointed to operate the properties to insure the payment of any sums that might be found due her. (R. 3-4, 12.) Counsel were thereupon employed for Kenneth and taxpayer in an attempt to sustain Kenneth's ownership of the properties. After the Florida courts declared that taxpayer was the owner of the properties, taxpayer began an action in his own name in the United States District Court for the Southern District of Florida wherein he sought to recover possession of the properties held in receivership. (R. 5, 12.) Taxpayer bore the entire cost of the litigation both for himself and Kenneth (R. 6, 12) and claims a deduction therefore in the amount of \$5,500 for 1946, and \$5,035 for 1947 (R. 11).

As the Tax Court held (R. 12), taxpayer was a mere volunteer with respect to the legal fees paid on behalf of his son Kenneth, and consequently they are not deductible under any theory.

As to taxpayer's own legal expenses (the amount of which is not disclosed by the record), the Tax Court found (R. 12-13) that the "genesis of the litigation" giving rise thereto was the dispute between taxpayer and his wife over support payments, that they were incurred primarily to defeat the wife's suit and not to protect taxpayer's property, and consequently that they were not deductible as non-business expenses under Section 23(a)(2). That conclusion is supported by this Court's decision in *Howard v. Commissioner*, 202 F. 2d 28, affirming 16 T. C. 157, wherein it was held that at-

torneys fees and costs incident to the defense of an action brought by a divorced wife to collect alimony payments were not deductible by the husband as a non-business expense under Section 23(a)(2). See also *Jergens v. Commissioner*, 17 T. C. 806, and *Donnelly v. Commissioner*, 16 T. C. 1196.

In the alternative, taxpayer claims (Br. 13) that "the least" the Commissioner should have allowed him was to add to the cost of the Maxwell Court Apartment the legal fees and expenses incurred "in defending and maintaining litigation seeking to protect the title and right to possession and right to receive the earnings from the income producing property", and thus apparently (R. 13-14) to reduce his capital gain on the sale of that apartment. As the Tax Court reiterated (R. 14) they were not such expenditures but were primarily incurred in attempting to defeat his wife's claim for support.

### III

#### **The Tax Court Did Not Err in Failing to Allow the Increased Depreciation Claimed**

With respect to his contention (Br. 11-12) that the Tax Court erred in failing to allow all the depreciation claimed by him on the properties in question, the Tax Court pointed out (R. 14) that in view of its holding that taxpayer was properly taxable on income therefrom in 1946 he was also entitled to depreciation thereon in the amount disallowed by the Commissioner. However, it refused to allow increased depreciation claimed in his amended pleadings because the record contained no evidence on which it could reasonably make a finding on the issue. Although patently claiming error in this respect, taxpayer fails to point to any facts of

record supporting his position. It is axiomatic that the burden of proving the right to a claimed deduction rests upon taxpayer. *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593; *Deputy v. duPont*, 308 U.S. 488, 493.

## CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

H. BRIAN HOLLAND,  
*Assistant Attorney General.*

ELLIS N. SLACK,  
A. F. PRESCOTT,  
GEORGE F. LYNCH,  
*Special Assistants to the  
Attorney General.*

AUGUST, 1954.

## APPENDIX

## Internal Revenue Code:

## SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. \* \* \*

\* \* \* \* \*

(k) [as added by Sec. 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife \* \* \*.

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 22.)

## SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses*.—

\*            \*            \*            \*            \*

(2) [as added by Sec. 121(a) of the Revenue Act of 1942, *supra*] *Non-Trade or Non-Business Expenses*.—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

\*            \*            \*            \*            \*

(1) [as amended by Sec. 121(c) of the Revenue Act of 1942, *supra*] *Depreciation Deduction*.—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

\*            \*            \*            \*            \*

(u) [as added by Sec. 120(b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments*.—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible

in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 171 [as added by Section 120(c) of the Revenue Act of 1942, *supra*]. INCOME OF AN ESTATE OR TRUST IN CASE OF DIVORCE, ETC.

(a) *Inclusion in Gross Income.*—There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance the amount of the income of any trust which such wife is entitled to receive and which, except for the provisions of this section, would be includible in the gross income of her husband, and such amount shall not, despite section 166, section 167, or any other provision of this chapter, be includible in the gross income of such husband. \* \* \*

(b) *Wife Considered A Beneficiary.*—For the purposes of computing the net income of the estate or trust and the net income of the wife described in section 22(k) or subsection (a) of this section, such wife shall be considered as the beneficiary specified in this supplement. A periodic payment under section 22(k) to any part of which the provisions of this supplement are applicable shall be included in the gross income of the beneficiary in the taxable year in which under this supplement such part is required to be included.

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 171.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22(k)-1. *Alimony and separate maintenance payments—Income to former wife.—(a) In general.—\* \* \**

In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or

(2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

(1) A court order or decree divorcing or legally separating the husband and wife, or

(2) A written instrument incident to such divorce or legal separation.

The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross



income of the husband. See also section 29.171-1 in cases where such periodic payments are attributable to property held in trust.

\* \* \* \* \*